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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KAISER AUMOEUALOGO, Defendant and Appellant.	E063006 (Super.Ct.No. FWV1300867) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Kaiser Aumoeualogo pled no contest to receiving a stolen vehicle (Pen. Code,[1] § 496d, subd. (a), count 1) and giving false information to a peace officer (§ 148.9, count 3). He admitted that he had one prior strike conviction. (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). The court sentenced defendant to a total term of six years in state prison. He subsequently filed a petition for resentencing, pursuant to section 1170.18 (Proposition 47). The court found him ineligible for relief and denied the petition. Defendant now appeals, arguing that the court erred in not reducing his sentence, and that the failure to apply Proposition 47 to convictions for receiving a stolen vehicle violates equal protection. We direct the court to dismiss count 2. Otherwise, we affirm.

PROCEDURAL BACKGROUND

On March 26, 2013, defendant was charged by information with receiving a stolen vehicle (§ 496d, subd. (a), count 1) and false impersonation (§ 529, count 2). The information also alleged that defendant had one prior strike conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), had served one prior prison sentence (§ 667.5, subd. (b)), and that at the time of the commission of the offenses, he was out of custody on bail in another case (§ 12022.1).

On April 26, 2013, the prosecution orally added an allegation of a violation of section 148.9, subdivision (a), giving false information to a peace officer (count 3).

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[1] All further statutory references will be to the Penal Code, unless otherwise noted.

Defendant entered a plea agreement and pled no contest to counts 1 and 3 and admitted the prior strike conviction. The terms of the plea agreement stated that the court was to sentence defendant to the middle term of two years on count 1, doubled pursuant to the prior strike, plus a concurrent six-month term on count 3. The court released defendant on a *Cruz*[2] waiver, explaining that if he violated any of the terms of the waiver, the court would not be bound to the plea agreement. Defendant failed to appear for sentencing, and the court issued a bench warrant. The court subsequently found defendant in violation of his *Cruz* waiver. It then modified his term and sentenced him to the aggravated term of three years, doubled pursuant to the strike conviction, on count 1, plus a concurrent 90 days on count 3.

On December 22, 2014, defendant filed a Proposition 47 petition for resentencing to have his felony in count 1 designated as a misdemeanor. (§ 1170.18.) On January 30, 2015, the court found that defendant did not qualify for resentencing under Proposition 47 and denied the petition.

On February 23, 2015, defendant filed a motion for reconsideration, in propria persona. By order filed on March 9, 2015, this court, on its own motion, deemed the motion for reconsideration a notice of appeal from the court's denial of defendant's petition. On March 9, 2015, appellate counsel filed an amended notice of appeal.

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[2] *People v. Cruz* (1988) 44 Cal.3d 1247.

DISCUSSION

I. The Court Properly Found Defendant Ineligible for Relief Under Proposition 47

Defendant argues that he was entitled to have his felony conviction for receiving a stolen vehicle (§ 496d, subd. (a)) reduced to a misdemeanor, pursuant to Proposition 47. We disagree.

A. *Relevant Law*

On November 4, 2014, voters enacted Proposition 47, and it went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Id.* at p. 1092.)

B. *Receiving a Stolen Vehicle is Not Enumerated in Section 1170.18*

Among the crimes reduced to misdemeanors by Proposition 47, rendering the person convicted of the crime eligible for resentencing, are: shoplifting where the property value does not exceed $950 (§ 459.5); petty theft, defined as theft of property where value of the money, labor, real or personal property taken does not exceed $950

(§490.2); and receiving stolen property where the property value does not exceed $950 (§ 496). (§ 1170.18, subd. (a).) Section 1170.18 does not list section 496d, the offense at issue in the present appeal, as one of the code sections amended or added by Proposition 47. In other words, as this court recently held, receiving a stolen vehicle is not now a misdemeanor under Proposition 47. (*People v. Garness* (2015) 241 Cal.App.4th 1370, 1374-1375 [Fourth Dist., Div. Two] (*Garness*).) Thus, defendant is simply not statutorily eligible for relief under section 1170.18.

Nonetheless, defendant argues that his conviction should be reduced to a misdemeanor. He points to Proposition 47's addition of section 490.2 and its amendment of section 496. Section 490.2 states that, notwithstanding any provision defining grand theft, the offense of obtaining property by theft, where the value of property at issue does not exceed $950, shall be considered petty theft and punished as a misdemeanor. (§ 490.2, subd. (a).) Defendant asserts that "section 490.2 must refer to other offenses that are not explicitly modified in the way the proposition changed section 496 and other similar low-level offenses." He then concludes that section 490.2 "should apply to the receipt of a stolen vehicle," since "[t]here is no reason to believe a vehicle is not 'property.' " In other words, he argues that receipt of a stolen vehicle is a theft-related offense that falls with the "catchall provision" of section 490.2. Defendant cites no authority for his proposition. Furthermore, auto theft is a different crime than buying or receiving a stolen vehicle. (§ 496d.) To construe Proposition 47 to include receiving a stolen vehicle (§ 496d) would violate the cardinal rule of statutory construction.

"'"'When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." [Citation.]'" (*People v. Hendrix* (1997) 16 Cal.4th 508, 512.) Proposition 47 lists a specific series of crimes that qualify for reduction to a misdemeanor, separated with the conjunction "or" and ending with the phrase "as those sections have been amended or added by this act." (§ 1170.18, subd. (a).) That list does not include section 496d, receiving a stolen vehicle. "The legislative inclusion of the . . . crimes . . . necessarily excludes any other[s]." (*People v. Gray* (1979) 91 Cal.App.3d 545, 551.) Based on the statutory language, the court properly denied defendant's petition to reduce his conviction to a misdemeanor. (*Garness*, *supra*, 241 Cal.App.4th at pp. 1374-1375.)

Moreover, even if defendant's statutory interpretation of Proposition 47 was correct, he failed to show that he was eligible for relief. "[A] petitioner for resentencing under Proposition 47 must establish his or her eligibility for such resentencing." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 878 (*Sherow*).) Defendant had the burden to show the value of the stolen vehicle did not exceed $950 to establish eligibility for resentencing under section 1170.18. However, he did not provide any supporting documentation and did not cite to the record or other evidence. He simply failed to meet his burden of proof.

In his reply brief, defendant urges this court not to follow *Sherow*, arguing that it conflicts with existing case law and claiming that *the prosecution* must bear the burden of proof that the value of the property exceeded $950. However, his argument and the

authorities he cites are based on the prosecutor's burden of proof in the *initial prosecution* for an offense. (See *Sherow, supra,* 239 Cal.App.4th at p. 880.) The resentencing provisions of Proposition 47 "deal with persons who have already been proved guilty of their offenses beyond a reasonable doubt." (*Ibid*.) Contrary to defendant's claim, the prosecution does not have the burden to prove a defendant is *not* eligible for resentencing. Rather, the burden is on the petitioner to prove that he is eligible for the resentencing he is requesting. (*Id*. at p. 878.)

Defendant asserts that "there is also a presumption that a conviction supports the least serious offense when the record is ambiguous." However, there is no ambiguity in this record. He further argues that respondent's argument that his petition failed to prove the value of the car is "largely premature" because the court denied his petition on the grounds that the charge was ineligible under Proposition 47; thus, the question of the value of the vehicle "was never reached at the hearing." However, as explained in *Sherow*, """[a] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting."""" (*Sherow*, *supra*, 239 Cal.App.4th at p. 879.) The *Sherow* court held that the petitioner had the burden of establishing eligibility for resentencing under Proposition 47. (*Id*. at p. 878.) Since the defendant in that case failed to do so, the court affirmed the trial court's denial of his petition for resentencing. (*Id*. at pp. 880-881.) Like the defendant in *Sherow*, defendant here failed to establish eligibility, including that the vehicle was valued under $950. Thus, the trial court properly denied his petition.

C. *Defendant Has Not Shown an Equal Protection Violation*

Defendant also claims that equal protection principles require that Proposition 47 relief apply to section 496d convictions. The problem is that defendant has not demonstrated that his conviction for receiving a stolen vehicle places him in a class of persons similarly situated to those who receive relief under Proposition 47. (See *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253 [“‘The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.’”].)

Defendant gives an example where a defendant prosecuted under section 496d (receiving a stolen vehicle) may suffer a felony conviction, whereas “a similar defendant prosecuted for theft of a vehicle under section 487, subdivision (d)(1) can only suffer a misdemeanor conviction.” He asserts that defendants under sections 496d and 487, subdivision (d)(1), are similarly situated because the same conduct triggers both statutes (e.g., the theft of a vehicle). Defendant’s example is puzzling since section 487, subdivision (d)(1), defines grand theft of a vehicle, and Proposition 47 does not make grand theft (where the value of the property taken exceeds $950) a misdemeanor. (§ 1170.18.)

Even assuming arguendo that stealing a vehicle worth *less* than $950 would be a misdemeanor petty theft under Proposition 47 (§§ 490.2, 1170.18), and that defendant meant to compare himself with a person convicted of that offense, he has failed to

demonstrate that he was similarly situated, since he has not shown that the stolen vehicle he received was worth less than $950. The record of conviction showed only that he "did unlawfully buy and receive [a] 2000 Nissan Sentra . . . that was stolen and had been obtained in a manner constituting theft and extortion. . . ." Defendant did not attach to his petition for resentencing any evidence of the "value of the . . . personal property taken." (§ 490.2.) Moreover, he concedes that the record of conviction did not disclose the value of the stolen vehicle. Therefore, he has failed to establish an equal protection violation and has shown no error in the denial of his petition for resentencing.

II. The Trial Court Neglected to Dismiss Count 2 and Other Allegations

Although not raised by the parties, we note an apparent clerical error. Generally, a clerical error is one inadvertently made. (*People v. Schultz* (1965) 238 Cal.App.2d 804, 808.) Clerical error can be made by a clerk, by counsel, or by the court itself. (*Ibid.* [judge misspoke].) A court "has the inherent power to correct clerical errors so as to make these records reflect the true facts." (*In re Candelario* (1970) 3 Cal.3d 702, 705.)

In this case, the court neglected to dismiss count 2, the prior prison allegation (§ 667.5, subd. (b)), and the allegations that defendant committed the offense while out on bail on another case (§ 12022.1). The plea agreement stated that defendant would plead no contest to receiving a stolen vehicle (count 1) and giving false information to a peace officer (count 3), in exchange for a specified term and the dismissal of the remaining counts and allegations. Defendant pled no contest to counts 1 and 3, but the court did not dismiss the remaining count and allegations. Nonetheless, the minute order

states that the court ordered count 2 and the other allegations dismissed, on motion of the People. Neither party mentioned the court's failure to dismiss the remaining count and allegations, below or on appeal. Thus, the record indicates that the parties intended those allegations and count to be dismissed. It is evident the court's failure to order the dismissal was inadvertent. Accordingly, in the interest of clarity, we will direct the trial court to dismiss count 2 and the allegations under sections 667.5, subdivision (b), and 12022.1.

DISPOSITION

The trial court is directed to order the dismissal of count 2 and the allegations under sections 667.5, subdivision (b), and 12022.1. In all other respects, the judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.